PD-0241-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/3/2020 8:20 PM
Accepted 9/8/2020 8:31 AM
DEANA WILLIAMSON
CLERK

No. 14-17-00606-CR
In the
Court of Criminal Appeals of Texas

FILED
COURT OF CRIMINAL APPEALS
9/8/2020
DEANA WILLIAMSON, CLERK

No. 1513928
In the 177th District Court
Of Harris County, Texas

No 14-17-00606-CR
In the Fourteenth District Court of Appeals, at Houston

SUZANNE ELIZABETH WEXLER
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT NOT GRANTED

STATEMENT REGARDING ORAL ARGUMENT

This Court granted review of this cause but declined to grant oral argument. The State does not request oral argument

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. § 38.2 (a)(1)(A), a complete list of the names of all interested parties is provided below.

Counsel for the State:

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Appellant and counsel:

Suzanne Wexler — Appellant
James H. Dyer — Defense counsel at trial
Sarah Wood — Defense counsel at new trial hearing
Nicholas Mensch — Defense counsel on appeal

Trial Judge:

Honorable Robert Johnson — Judge Presiding at trial

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STATEMENT OF THE CASE

A grand jury indicted Appellant for the felony offense of possession of a controlled substance with an intent to distribute, which occurred on or about June 16, 2016. (C.R. 10).[1] On June 27, 2017, a jury convicted Appellant for the charged offense. (C.R. 58). On the same day, the trial court sentenced Appellant to 25 years in the Institutional Division of the Texas Department of Criminal Justice. (C.R. 60). Appellant gave her notice of appeal on July 17, 2017; the trial court certified Appellant's right to appeal on the same day. (C.R. 73-74). On May 03, 2018, after a hearing, the trial court denied Appellant's motion for new trial. (C.R. III 03).

On direct appeal, a majority of the Fourteenth Court of Appeals panel affirmed Appellant's conviction and sentence. *Wexler v. State*, 593 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2019, pet. granted). Appellant filed a motion for *en banc* reconsideration, which was denied with two justices voting to grant. This Court granted discretionary review.

[1] There are multiple clerk's records in this case. For purposes of this brief, the original clerk's record will appear as "(C.R. ##)," the clerk's record delivered to this court on May 23rd, 2018 will appear as "(C.R. II ##)," and the clerk's record delivered to this court on Aug. 07th, 2018 will appear as "(C.R. III ##)."

STATEMENT OF FACTS

On June 16, 2016, in the morning or midday, officers executed a narcotics search warrant at Appellant's home in Harris County, Texas. (R.R. III 45). Officers had stopped multiple people who had visited the home and were subsequently found to be in possession of methamphetamine. (R.R. III 37-38). Officers received information that the Appellant and her boyfriend, Jimmy, were selling narcotics from the home. (R.R. III 114; 129-30). The case agent for the investigation was Detective J. Hill. *Id.* at 44-45. As the case agent, Det. Hill led the investigation, and, ultimately, determined whether Appellant would or would not be placed under arrest. *Id.* at 110-11.

Several officers arrived at the location, including deputies with the Harris County Sheriff's Office High Risk Operations Unit ("HROU"). *Id.* at 45-46. After officers set up at the target location and blocked off the entrance to the street, they announced their intention to search the home over a speaker system and directed the occupants of the home to exit. *Id.* at 46. Appellant exited the home and was detained in the back seat of a patrol car in front of the house while HROU began its protective sweep of the house. *Id.* at 45-46. While HROU initiated its sweep of the house, Det. Hill asked Appellant, "Hey, we have a search warrant. We're going to find the drugs. Just tell me where they are."

There was no evidence that Appellant was handcuffed or otherwise restrained by officers. There was no evidence that officers pointed firearms at Appellant or

threatened Appellant. There was no evidence that Det. Hill was hostile in tone. Det. Hill did not tell Appellant that she was a suspect. *Id.* at 53. At the time that Det. Hill spoke with Appellant the investigation was ongoing and police had not yet discovered narcotics in the home; the narcotics were found later. *Id.* at 82. Neither Appellant nor Det. Hill testified about what Appellant saw, heard or experienced. *E.g.*, *Id.* at 52 ("I don't know. I can't say what she knew").

Appellant told Det. Hill that the narcotics were "in her bedroom in a dresser drawer." *Id.* at 58. Once HROU had swept the home, narcotics officers went into the home. *Id.* Inside Appellant's bedroom, officers found drug paraphernalia, several cell phones, scales, and marihuana individually bagged for sale. *Id.* at 79-81. Additionally, in her dresser drawer, officers found what turned out to be 25.077 grams of methamphetamine and 4.881 grams of a "beige, crystalline substance." *Id.* at 82-83; (St. Ex. 51). Along with the methamphetamine were "a bunch of plastic baggies and some currency." (R.R. III 83-84). The items that the narcotics officers found were consistent with the sale of narcotics. *Id.* at 84. The closet in the room was filed with female clothing. *Id.* at 118; (St. Ex. 50).

While Appellant was the only female located in the house, she was not alone. A man, John Forster, was in the back room. *Id.* at 89; (R.R. IV 29). He was arrested for possession of less than a gram of black tar heroin. (R.R. III 89). The room in which officers found him was a different room than Appellant's bedroom. *Id.* at 89-90. He did not live at the house. *Id.* at 90. He was subsequently convicted and served

time in custody for his offense. (R.R. IV 31). Appellant did not call Forster at trial. Instead, Appellant called the person with whom she claimed to be living at the time of her arrest, Jimmy Sherlock. *Id.* at 24. Sherlock claimed that Appellant lived with him, and that he dropped Appellant off at the house earlier in the day. *Id.* at 27-29.

After Appellant was convicted, she moved for a new trial and claimed, among other things, that her counsel was ineffective for failing to call Forster. (C.R. III 06). The trial court held a hearing on Appellant's motion, ultimately denying it. (C.R. II 03).

SUMMARY OF THE ARGUMENT

The court below did not err. The court properly considered the fact and circumstances presented by Appellant to find that Appellant was not "in custody" at the time that she spoke with Det. Hill. The *Sheppard* factors are appropriate to consider when a detention rises to custodial under either the Fourth or Fifth Amendment. Additionally, the trial court, in its role as fact finder, could properly decline to make certain factual inferences that Appellant now claims are compelled by the record.

REPLY TO APPELLANT'S POINT OF ERROR

In her first point of error, Appellant contends that the court of appeals erred when it upheld the trial court's implied finding that Appellant was not in custody. (Appellant's Brief – 08). Specifically, Appellant contends the court of appeals erred by considering the factors set out in *State v. Sheppard*. *Id.* Appellant also contends that the court of appeals erroneously excluded from consideration certain factual inferences that could be drawn from the record. *Id.* However, the court below properly concluded that the trial court did not err, and that Appellant was not in custody.

A. Applicable law and standard of review

A trial court's ruling on a motion to suppress is reviewed on appeal for abuse of discretion. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). The trial court is given almost complete deference in its determination of historical facts and

questions regarding mixed questions of law and facts that turn on evaluation of credibility and demeanor. *Id.* When the question is one of law as applied to uncontroverted facts, however, the standard of review is *de novo*. *Id.* An appellate court "will sustain the trial court's decision if it concludes that the decision is correct on any theory of law applicable to the case." *Id.* A trial court's determination of "custody" represents a mixed question of law and fact. *Herrera v. State*, 241 S.W.2d 520, 526 (Tex. Crim. App. 2007). When a trial judge denies a motion to suppress and does not enter findings of fact, as here, the evidence is viewed in the light most favorable to the ruling, and courts "assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record." *Id.* Courts review a trial court's ruling considering what was before the trial court at the time the ruling was made. *Allen v. State*, 473 S.W.2d 426, 443-44 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd).

A person is in "custody" only if, under the totality of the circumstances, "a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)(citing *Stansbury v. California*, 511 U.S. 318 (1994)). Further, "the reasonable person standard presupposes an *innocent* person." *Dowthitt*, 931 S.W.2d at 254 (internal quotations omitted, emphasis in original). A defendant has the burden of proving that a statement was the product of "custodial interrogation." *Herrera*, 241 S.W.2d at 526. Art. 38.22 and *Miranda* only apply to statements made as the result of

custodial interrogation. *Stone v. State*, 583 S.W.2d 410, 413 (Tex. Crim. App. 1979); TEX. CODE CRIM. P. Art. 38.22, § 5.

Officers may stop and briefly detain a person reasonably suspected of criminal activity in the absence of probable cause to arrest the person. *Balentine v. State*, 71 S.W.3d 763, 771 (Tex. Crim. App. 2002). A person held for investigative detention is not in custody. *Dowthitt*, 931 S.W.2d at 255. During the execution of a search warrant, officers may detain occupants. *United States v. Burns*, 37 F.3d 276, 281 (7th Cir. 1994)(citing *Michigan v. Summers*, 452 U.S. 692, 702 (1981)).

There are four general situations which may constitute custody: "(1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave." *Dowthitt*, 931 S.W.2d at 255.

When examining the first three situations, the "restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention." *Id.* (citing *Stansbury*, 511 U.S. at 322). The fourth situation requires "the officer's knowledge of probable cause be manifested to the suspect." *Dowthitt*, 931 S.W.2d at 255 (citing *Stansbury*, 511 U.S. at 322). Even under the fourth situation, custody is not established "unless the manifestation of probable cause

combined with other circumstances of the interview, such as duration or factors of the exercise of police control over a suspect, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App.2013)(internal quotations omitted)(citing *Dowthitt*, 931 S.W.2d at 256). "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue." *Stansbury*, 511 U.S. at 325.

Several factors for determining whether a person is detained or in custody are, "the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent…and any other relevant factors." *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008).

B. <u>Appellant invited the intermediate appellate court to review Appellant's detention status under the standard about which he is now complaining</u>

Appellant spends much of her argument faulting the court below for using *Sheppard v. State*. (Appellant's Brief – 15-16). However, Appellant presented the *Sheppard* framework for the intermediate court in her briefing. (Appellant's Court of Appeals Brief – 09-10)(listing *Sheppard* factors for determination of custody). Appellant relied on those factors in arguing that she was in custody. *Compare* (Appellant's Court of Appeals Brief – 13)(stating that Det. Hill did not tell Appellant that she was *not* under arrest nor told Appellant that she was free to leave) *with*

Sheppard, 271 S.W.3d at 291 (listing, among other factors, whether officer told suspect that they were under arrest or free to leave).

Appellant cannot now claim the intermediate court committed error when she invited that error in the first place.[2] The doctrine of "invited error" acts to prevent "a party from making an appellate error of an action it induced." *Prystash v. State*, 03 S.W. 522, 531 (Tex. Crim. App. 1999). Appellant argued within the rubric of *Sheppard* in her briefing and should not be able to now complain that the intermediate court did the same.

C. The *Sheppard* factors are relevant to a Fifth Amendment custody analysis and the trial court did not analyze Det. Hill's actions for "reasonableness"

Appellant was not "in custody" at the time that she gave her statement. Appellant contends that the intermediate court's use of the *Sheppard* factors was erroneous. (Appellant's Brief – 16). Appellant further contends that the intermediate court analysis only focused on the reasonableness of the officer's actions. *Id.* Appellant is incorrect on both.

Sheppard presented factors to assist a court in determining whether a defendant was either "in custody" or merely "detained." *Sheppard*, 271 S.W.3d at 291. The

[2] This, of course, assumes that it was error to review the *Sheppard* factors when considering whether Appellant had he freedom of movement restrained commensurate with a formal arrest. As noted in the next subsection, the court below did not err in using that framework.

intermediate court used those factors to determine whether Appellant was in custody. *Wexler*, 593 S.W.3d at 779-80.[3] Those factors include:

1. The amount of force displayed;
2. The duration of the detention;
3. The efficiency of the investigation;
4. Whether the restraint occurs at the location or the person is transported to another location; and,
5. Whether the officer told the detained person that the person was under arrest or was being detained only for a temporary detention.

Sheppard, 271 S.W.3d at 291. While *Sheppard* was a Fourth Amendment case, these factors still capture the purpose of a *Miranda* custody analysis. These factors objectively focus on the officer's actions in his or her interaction with a suspect.

The Supreme Court has listed several relevant factors for the determination of whether a defendant's freedom of movement is so restrained as to amount to "custody." *Howes v. Fields*, 565 U.S. 499 (2012). These factors include:

1. The location of questioning;
2. The duration of questioning;
3. Statements made during the interview;
4. The presence or absence of physical restraints during the questioning; and,

[3] In addition to the court below, almost every other intermediate court of appeals uses *Sheppard* in its *Miranda* custody analysis. *E.g.*, *Killebrew v. State*, No. 01-17-00367-CR, 2018 WL 4087306, at *04-05 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018, no pet.)(mem. op., not designated for publication); *Dees v. State*, Nos. 02-12-00488-CR & 02-12-00489-CR, 2013 WL 6869865, at *04-05 (Tex. App.—Fort Worth Dec. 27, 2013, pet. ref'd)(mem. op., not designated for publication); *State v. Dewbre*, No. 03-15-00786-CR, 2017 WL 3378882, at *05-06 (Tex. App.—Austin July 31, 2017, pet. ref'd)(mem. op., not designated for publication); *State v. Adams*, 454 S.W.3d 48, 50 (Tex. App.—San Antonio 2014, no pet.); *Weimer v. State*, No. 05-18-00717-CR, 2019 WL 2004060, at *02 (Tex. App.—Dallas May 07, 2019, no pet.)(mem. op., not designated for publication); *Bell v. State*, No. 08-13-00139-CR, 2015 WL 400464, at *03-04 (Tex. App.—El Paso Jan. 30, 2015, pet. ref'd)(mem. op., not designated for publication); *Olvera-Garza v. State*, No. 09-11-00073-CR, 2013 WL 1790679, at *08 (Tex. App.—Beaumont April 24, 2013, pet. ref'd)(mem. op., not designated for publication); *McGruder v. State*, No. 10-19-00064-CR, at *02 (Tex. App.—Waco Jan. 22, 2020, pet. ref'd)(mem. op., not designated for publication); *Quintanilla Ramirez v. State*, No. 13-18-00260-CR, 2019 WL 2622336, at *02-03 (Tex. App.—Corpus Christi-Edinburg June 27, 2019, no pet.)(mem. op., not designated for publication).

5. Release at the end of the questioning.

Id. These factors do not necessarily indicate custody where there is a limitation on the freedom of movement. *Id.* Instead, they are a "first step." *Id.* A complete analysis requires, once these factors indicate a curtailed freedom of movement, whether the environment was "inherently coercive" in the same way that backroom stationhouse questioning was in *Miranda*. *Id.*

The *Sheppard* factors encompass most of the factors listed in *Howes* – *e.g.*, the duration of the detention and the location. In fact, they go further. The display of force, for example, is not mentioned in *Howes*, but is a relevant under *Sheppard.* The "display of force" includes the fourth *Howes* factor of physical restraints, but also covers non-physical restraints. The display of force, however, is certainly a relevant factor for a Fifth Amendment analysis. Most of Appellant's argument centers on the alleged display of force. *E.g.*, (Appellant's Brief – 24)(arguing that Appellant entered a "police dominated atmosphere"). In addition to her reliance upon the *Sheppard* factors – overtly in the court below, and by implication in this court – Appellant has not identified a fact or factor that she was unable to present or the court below failed to consider because of *Sheppard.*

Appellant relies upon two federal cases – *Newton and Revels* – for the proposition that Fourth Amendment custody and Fifth Amendment custody are not

the same.[4] (Appellant's Brief – 17). The Fourth Amendment does focus on the reasonableness of an officer's actions, while the Fifth Amendment focuses on what a reasonable innocent person would perceive. Nothing in that principle, though, impeaches the opinion below. Both Newton and *Revels* based their decisions on handcuffing, something that is not present here. *U.S. v. Newton*, 369 F3d 659, 675-75 (2nd Cir. 2004)(noting "[h]andcuffs are generally recognized as a hallmark of a formal arrest" despite officers warning defendant that he was not under arrest); *U.S. v. Revels*, 510 F3d 1269, 1276 (10th Cir. 2007)(noting that officers breached defendant's front door, put her prone on the ground, and handcuffed her). There is no evidence that officer's handcuffed Appellant.

Appellant's claim that the opinion below analyzed Appellant's detention for the officer's "reasonableness" is incorrect. The court below identified Appellant's claim as a *Miranda* claim,[5] set out the applicable law under federal and state standards and recited the *Dowthitt* situations. *Wexler*, 593 S.W.3d at 778-79. The issue was, under the first three *Dowthitt* situations, whether Appellant was in custody or merely detained. *Id.* at 779-80; *c.f.*, *State v. Ortiz*, 382 S.W.3d 367, 373 (Tex. Crim. App. 2012)(noting that non-custodial detention may escalate to *Miranda* custody). The court below also recited the relevant reasonable innocent person standard of analysis.

[4] Appellant also relies on an Amarillo Court of Appeals case, *Ortiz v. State*. (Appellant's Brief – 16). *Ortiz* relied upon the same federal cases. *State v. Ortiz*, 346 S.W.3d 127, 134 (Tex. App.—Amarillo 2011) aff'd by 382 S.W.3d 367 (2012). Notably, this Court affirmed the Amarillo court, but did not echo the Amarillo court's statement regarding the two amendments.

[5] The court below also reviewed Appellant's claim under art. 38.22. *Wexler*, 593 S.W.3d at 778. Trial counsel did not invoke art. 38.22, but only claimed that Det. Hill "extract[ed] information from her without any safeguards." (R.R. III 56). Trial counsel never referenced art. 38.22.

Wexler, 593 S.W.3d at 779. The court below did not, however, say that the officer's actions were "reasonable" or invoked the Fourth Amendment during its analysis. During its analysis, the court below cited to cases dealing with *Miranda* claims. *Id.*[6]

Appellant also faults the court below for analyzing whether Det. Hill manifested his knowledge of probable cause to Appellant. (Appellant's Brief – 16). Appellant states that this analysis was done under *Sheppard*. *Id.* This is incorrect. The court below recited that Det. Hill was the only officer to speak with Appellant and did not tell her she was under arrest; the court immediately followed that up with a citation to this Court's statement from *Herrera*, a Fifth Amendment case, regarding the subjective belief of law enforcement. *Wexler*, 593 S.W.3d at 780. The only citation to *Sheppard* in the analysis below concerns the reason for Appellant's detention. *Id.* (noting that Appellant was detained so officers could perform a protective sweep); *c.f.*, *Estrada v. State*, No. PD-0106-13, 2014 WL 969221, at *05 (Tex. Crim. App. March 12, 2014)(not designated for publication)(noting that, where officers removed defendant from her vehicle upon discovery marihuana smell, such removal does not indicate custody because such removal "routinely occur[s] when an officer detects an odor of marijuana inside a vehicle"). Regardless, a reasonable innocent person would not be

[6] In its analysis, the court below cited to several cases dealing with *Miranda* issues. *E.g.*, *Ortiz v. State*, 421 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd)(analyzing whether handcuffing defendant as part of an assault investigation rose to *Miranda* custody); *Herrera v. State*, 241 S.W.3d 520 (Tex. Crim. App. 2007)(determining whether jail inmate was in custody); *Hernandez v. State*, 107 S.W.3d 41 (Tex. App.—San Antonio 2007, pet. ref'd)(examining whether a defendant was in custody when he gave statement during field sobriety tests). The court below did cite to two fourth amendment cases – *Sheppard* and *Mount* – but that was simply to recite the *Sheppard* custody factors. *Wexler*, 593 S.W.3d at 780.

surprised when officers remove them out of a place that is going to be searched pursuant to a warrant.

Appellant's contention that the court below improperly analyzed her custody claim by utilizing the *Sheppard* factors – factors that Appellant originally advanced – is without merit. While the court below did not use the words "reasonable person" in its analysis, that term is the natural implication based on the court's recitation of law and its subsequent analysis. Appellant does not identify what fact or circumstance the court should have considered but did not. Instead, Appellant's substantive argument revolves around what facts and inferences to consider, and rehashes the same argument regarding those facts that she made below. The court below properly analyzed Appellant's claim.

D. The court below properly excluded from its analysis several facts that were neither present nor mandated by the evidence

Appellant does not identify any fact or circumstance that the opinion below omitted due to the *Sheppard* factors. Instead, Appellant's argument largely focuses on the implication of facts that Appellant claims were mandated by the evidence. (Appellant's Brief – 20-36)(claiming that Appellant was necessarily aware of the number of officers, their actions, their placement outside her home, and relying on that to create a police dominated atmosphere).[7] Appellant spends much of this analysis going through Det. Hill's testimony about other officers. Appellant attempts

[7] Appellant ignores that, while the court below did state that the evidence did not support her claim that she was aware of these facts, the opinion goes on to state that "Even if she was, this evidence only goes to one of the factors listed in *Sheppard*, the amount of force used." *Wexler*, 593 S.W.3d at 780.

to tie that testimony to Appellant's physical placement to indicate that Appellant "would have been aware that a large contingent of HROU and an armored vehicle on the scene." (Appellant's Brief – 20). This analysis ignores the trial court's role as fact finder and implied findings to the contrary. *See*, *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000)("In a motion to suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses").

While there was no affirmative evidence that Appellant was aware of *any* of the facts that she advances, the trial court could have disregarded any of those facts if it so desired. *Id.* ("judge may believe or disbelieve all or any part of a witness's testimony even if that testimony is not controverted"). The trial court was under no obligation to believe that Appellant was aware of any of the facts that Appellant now advances, much give credit to their combined force.

Instead of affirmative evidence of Appellant's awareness, Appellant essentially mandates that the trial court had to draw certain inferences from the evidence. The trial court must draw these inferences because, as Appellant put it, "[b]ased on the evidence, *it stands to reason*." (Appellant's Brief – 22)(emphasis added). For example, because there were other HROU officers on scene Appellant must have been aware of all of them. (Appellant's Brief – 22)(describing the 20-25 HROU officers on scene and that Appellant would have been aware of them). The conclusion – that Appellant was aware of these officers – is an inference from the evidence. *See*, *Rabb v. State*, 434 S.W.3d 613, 617 (Tex. Crim. App. 2014)(noting that fact finders are permitted to draw

reasonable inferences if supported by the evidence). Of course, just because the trial court is *permitted* to draw that inferences does not mean the trial court is *required* to draw that inference. *See*, *Id.*

This is particularly correct in the context of the number of officers that Appellant may or may not have seen. It is possible that Appellant saw all 20-25 officers. It is also possible that she saw none or 1-2 of the officers. There is no evidence of the layout or positions of the officers, or what or how many officers were doing what. There is no evidence of where specifically their vehicles were. There is no evidence of how they staged and how visible the vehicles were to somebody in Appellant's vantage. These contradictory possibilities must be resolved. And they were impliedly resolved by the trial court as fact finder.

The trial court *could* have impliedly inferred that Appellant was aware of many officers on the scene. The trial court *could* have impliedly inferred that Appellant was aware that she was confronted with an armored vehicle. The trial court could have made numerous inferences based on the evidence. But it was not required to. And the court below was correct to disregard these factual inferences in its analysis. Appellant's claim that the evidence, not only supported, but essentially mandated these inferences in her favor is unfounded. *Herrera*, 241 S.W.2d at 526 (courts are to review implied findings in the light most favorable to the ruling)

E. Even without using the *Sheppard* factors, Appellant was not in custody at the time that she made her statement

Even discarding the *Sheppard* custody factors, the evidence still supports the trial court's ruling that Appellant was not in custody.

Reviewing Appellant's detention under the *Howes* factors, for example, indicates that she was not in custody. *See*, *Howes*, 565 U.S. at 509. The location of the questioning was outside of Appellant's home as she was being detained in the back of a patrol car. *See*, *Id.* (location of questioning is a relevant factor). The questioning was not in the back of a stationhouse, but was in daylight and in public as Appellant was in the back of a patrol car.[8] *C.f.*, *Berkemer McCarty*, 468 U.S. 420, 438 (1984) ("Perhaps most importantly, the typical traffic stop is public, at least to some degree…This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that…he will be subject to abuse"). The duration of the questioning was exceedingly brief – both in duration of the actual questioning and the duration of the time until questioning. *See*, *Howes*, 565 U.S. at 509 (duration of questioning is relevant factor). The record indicates that Appellant came out of her house, was detained in the back of a patrol car, and spoke to Det. Hill; there is no indication of a delay during these events. (R.R. III 47). Further, Det. Hill's asked a single question, to which Appellant responded. (R.R. III 52). This is not a prolonged

[8] The record does not indicate whether the car door was closed or whether Appellant was locked inside while Det. Hill spoke to her.

marathon of questioning. *C.f.*, *Berkemer*, 468 U.S. at 437-48 (stating that traffic stops are usually brief, while stationhouse questioning like in *Miranda* is "frequently prolonged" and that "the detainee is aware that questioning will continue until he provides his interrogators the answers they seek"). These *Howes* factors do not indicate custody.

The statements made during the questioning do not indicate Appellant was in custody. *See*, *Howes*, 565 U.S. at 509 (statements made during the interrogation is a relevant factor). While Det. Hill's statement did indicate a suspicion that Appellant was involved in criminal activity, officers had not yet found that a crime had occurred. *C.f.*, *Dowthitt*, 931 S.W.2d at 255 (custody may exist where "there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave"). Officers had not found any contraband yet. A reasonable innocent person in Appellant's position would know that they cannot be under arrest for possessing contraband that doesn't exist. This *Howes* factor does not indicate custody.

Officers did not use handcuffs or leg irons to restrain Appellant. *See*, *Howes*, 565 U.S. at 509 (use or absence of physical restraints is a relevant factor). While Appellant was detained in the back of a patrol car, which does tend towards custody. However, there is nothing in the record to indicate that officers locked Appellant in the back of the patrol car or otherwise confined her by the time Det. Hill spoke with Appellant. Even if this factor tends towards custody, it only minorly does so.

Finally, Appellant was not released after Det. Hill questioned her. *See*, *Howes*, 565 U.S. at 509 (release of interview after questioning is a relevant factor). This factor tends towards custody. However, since Appellant's continued detention was due to the execution of the search warrant and that probable cause to arrest Appellant had not yet been discovered, this weight of this factor should also be minor. Overall, the weight of the factors listed in *Howes* do not indicate Appellant was in custody or had her freedom of movement restricted in a manner normally associated with a formal arrest.

It is noteworthy that Appellant's argument in this Court largely mirrors the factors in a *Sheppard* analysis.[9] For example, Appellant relies on the number officers present, the order from a PA system, and an "implied threat" to indicate that Appellant was in custody. These are all facts that would be analyzed under the display of force in a *Sheppard* analysis. *See*, *Sheppard*, 271 S.W.3d at 291 (one factor is "the amount of force displayed"). Appellant also cites to the fact that Det. Hill did not inform Appellant that she was not under arrest, which is also a factor under *Sheppard*. *See*, *Id.* (one factor is "whether the officer told the detained person that the person was under arrest or was being detained only for a temporary detention").

[9] These arguments were not raised in the trial court. Instead, trial counsel argued that she required "safeguards" because Det. Hill suspected her. (R.R. III 56)("Judge, he said that she's been a suspect for some 11 days prior to this conversation"; "He had an obligation, if she's a suspect…But this one, he suspects her of things and he's extracting information from her without any safeguards…"). Trial counsel never argued that the area was police dominated, or that Appellant felt threatened, or that she was coerced due to the police presence.

Nonetheless, Appellant maintains that this Court's resolution of *State v. Ortiz* mandates a reversal in this case. (Appellant's Brief – 28-30). In *Ortiz*, officers asked the defendant and his wife multiple times about cocaine. *Ortiz*, 382 S.W.3d at 370. Despite multiple denials by the defendant, officers persisted in questioning him about drugs, handcuffed his wife, and searched his person, his car, and his wife. *Id.* While searching the defendant's wife, officers found contraband and immediately handcuffed the defendant while saying "Yep. Turn around. Put your hands behind your back." *Id.* After that, the officers elicited from the defendant that the contraband was cocaine. *Id.* Appellant contends that the situation in *Ortiz* and her situation are fundamentally the same.

There are key factual differences. First, and most obviously, the officers in *Ortiz* had the drugs in their hands – *i.e.*, probable cause of a crime – by the time they handcuffed and questioned the defendant. A reasonable innocent person in the defendant's position in *Ortiz* would know that they were under arrest: officers had already demonstrated a fervent belief that the defendant was committing a crime *and* they had something to arrest him for – the drugs. Without the contraband, there is no arrest and a reasonable innocent person would know that. In this case, police had not found contraband. A reasonable innocent person in Appellant's shoes would know that the officers were going to search the home and that they may or may not locate contraband. In fact, a reasonable *innocent* person would have no reason to believe that the officers would locate contraband.

Second, the repeated questioning of the defendant in *Ortiz*, despite his denials, edges that case closer to *Miranda* concerns than *Berkemer*. *See*, *Berkemer*, 468 U.S. at 438 (remarking that the interrogation of concern in *Miranda* was prolonged and "in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek"). While persistence in investigation despite protestations does not necessarily transform a detention to custody, it does push it closer. That persistence is not present in Appellant's case. Officers asked Appellant a single question and got a single answer. It is unknown if Det. Hill would have persisted and created more pressure on Appellant if she denied knowledge. Potentially, because he had a house to search, he would have moved on. But that does not matter because Det. Hill asked a single question and Appellant gave a single answer.

Third, the *Ortiz* defendant was handcuffed. *Ortiz*, 382 S.W.3d at 374-75. Handcuffing, while not *per se* custodial, can do a lot of leg work to get there. *See*, *e.g.*, *Newton*, 369 F.3d at 676 ("Handcuffs are generally recognized as a hallmark of a formal arrest"). And the defendant in *Ortiz* was not just handcuffed. He was handcuffed after seeing his wife get handcuffed, seeing the police had found something they believed to be contraband, and an officer immediately saying "Yep. Turn around. Put your hands behind your back." *Id.* There was no handcuffing at play in Appellant's case. The strongest restraint Appellant incurred was being placed

in the back seat of a patrol car that may or may not have been secured. This is a far cry from the handcuffing in *Ortiz*. Appellant's reliance on *Ortiz* is misplaced.

Even disregarding *Sheppard*, the facts and evidence do not support Appellant's claim that she was in custody at the time Det. Hill spoke with her. Appellant's interaction with Det. Hill was short and in public view. A reasonable innocent person in Appellant's shoes would also know that they were not under arrest because the officers had not discovered any drugs to arrest for. The opinion of the court below should be affirmed.

F. The dissent below is wrong on the law, the facts, and the implication of those facts

While Appellant recites some of the phrases from the dissent below, she does not appear to wholesale adopt the dissent's argument. However, in as much as Appellant relies on the dissent below, that reliance is misplaced. The dissent below is incorrect when it comes to the law, mandates the adoption of inferences, and creates facts not found in the record to support itself.

At the outside, the dissent cites to several cases from the 70's and 80's regarding detentions during traffic stops that were considered custodial. *Wexler*, 593 S.W.3d at 784-85 (Hassan, J., dissenting). The most recent of those case the dissent below cites is from 1982. *Id.* Each of these, however, predated *Berkemer v. McCarty*, which decided that roadside detentions generally did not trigger the same sort of *Miranda* implications as backroom stationhouse questioning. *See*, *Berkemer*, 468 U.S.

420. Regardless of the validity of those cases post-*Berkemer*, the dissent's seemingly *per se* statement that "the placement in a police vehicle significantly impacted her 'freedom of movement' and constituted custody" is unsupported in caselaw. *E.g.*, *Koch v. State*, 484 S.W.3d 482, 489 (Tex. App.—Houston [1st Dist.] 2016, no pet.)(detention in back of patrol car in handcuffs was not custody); *Hauer v. State*, 466 S.W.3d 886, 892-93 (Tex. App.—Houston [14th Dist.] 2015, no pet.)(same); *Matter of S.C.*, 523 S.W.3d 279, 283-84 (Tex. App.—San Antonio 2017, pet. denied)(same); *see also*, *Saenz*, 411 S.W.3d at 498("an officer does not necessarily manifest to a suspect that there is probable cause to arrest him merely by silently placing him in the back of a patrol car when there is probable cause to arrest him").

The dissent's factual analysis also fell into the same problem that Appellant does. The dissent took as a given that Appellant was aware of an "organized and well-equipped amassment of law enforcement personnel." *Wexler*, 593 S.W.3d at 784 (Hassan, J. dissenting). The dissent ignored the trial court's role as fact finder and its ability to believe or disbelieve evidence, and its ability *not* to make certain inferences.

The dissent also imported facts found nowhere in the record – either explicitly or by inference. The issue of police brutality, while certainly important on a societal level, is completely absent from the record. Nobody testified that officers used force. Nobody testified that they were even *afraid* that officers would use force. And yet, the dissent invoked the possibility of force that is used against "many people" as an important factor in its argument that Appellant was in custody. *Id.* at 785-86 (Hassan,

J., dissenting). It is one thing to mandate the trial court make certain inferences. It is another to mandate the trial court take consideration of facts completely absent from the record. The dissent was incorrect to include this as a basis for claiming Appellant was in custody.

Finally, the dissent places great importance on the fact that officers were targeting a "specific house" and that they were not conducting a "general investigation." The fact that officers were targeting a "specific house" – even for a specific crime – does not transform a detention into custody any more than a traffic officer pulling over a specific driver in a specific car for any number of specific crimes. *C.f.*, *Stansbury*, 511 U.S. at 325 ("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue"). Officers never told Appellant that she was the "prime suspect." The warrant does not list Appellant. (St. Ex. 02). For all of Det. Hill's investigation that led to the warrant – and Appellant's implication therein – none of that was conveyed to Appellant.

The dissent's argument is flawed and unsupportable. In as much as Appellant echoes portions of it, that reliance is misplaced.

CONCLUSION

The court below did not err in considering the *Sheppard* factors – as prompted by Appellant below – in its analysis. The *Sheppard* factors are relevant to determining whether a person's detention escalates to custody. The court below also correctly discounted the inferences that the trial court was not obligated to find regarding Appellant's awareness of the police in her surroundings. Appellant was not in custody at the time that she briefly spoke with Det. Hill.

PRAYER FOR RELIEF

It is respectfully submitted that all things are regular, and the conviction should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

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